THE ALI PRINCIPLES: A FAREWELL TO FAULT—BUT WHAT REMEDY FOR THE EGREGIOUS MARITAL MISCONDUCT OF AN ABUSIVE SPOUSE?

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> For her forthcoming book on divorce, *For Richer, For Poorer*, my colleague, Professor Demie Kurz, interviewed 129 women of many races, ages, and classes, investigating their stories about why their marriages ended. Over half of the women in Kurz's study, and up to eighty percent of those in working class and lower class marriages, told narratives of husbands who abused alcohol and drugs, slept with other women, beat and raped their wives and their children, and actually or constructively abandoned the home.. . . In the terminology of fault and no-fault [divorce], the typical woman in Kurz's study stated a prima facie case of a fault-based divorce. . . How many of these women nevertheless see their marriages end with a judgment that forces the sale of the [marital] home for "equitable" distribution to their abusers?[1]

I. INTRODUCTION

Divorce reform in America is currently at a crossroads.[2] Prior to California's landmark no-fault divorce legislation in 1969, a number of sociologists, jurists, lawyers, legislators, and other Americans had become dissatisfied with many perceived defects in America's fault-based divorce system. They argued that divorce should not be based solely upon traditional fault grounds such as adultery, cruelty, and desertion. Instead, divorce should be viewed as a regrettable, but necessary, legal definition of marital failure, where very often the factors leading to the marriage breakdown were not all one-sided or based solely on the marital fault of one guilty spouse, but were caused by the incompatibility or irreconcilable differences of both spouses.[3] The ensuing no-fault divorce legislation, presently enacted in all fifty states,[4] was intended to be a good faith

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1. Barbara Bennett Woodhouse, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525, 2550 (1994).

2. *See, e.g.*, DIVORCE REFORM AT THE CROSSROADS (Stephen D. Sugarman & Herma Hill Kay, eds., 1990); *Millennium Issue: Family Law at the End of the Twentieth Century*, 33 FAM. L.Q. 447-863 (1999).

3. *See, e.g.*, Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32 (1966). *See generally* MAX RHEINSTEIN, MARRIAGE STABILITY, DIVORCE, AND THE LAW (1972); LYNNE CAROL HALEM, DIVORCE REFROM: CHANGING LEGAL AND SOCIAL PERSPECTIVES (1980).

4. Currently, all 50 states have enacted some form of no-fault divorce legislation, either based on the parties' separation for a specified period of time, or based upon the parties' incompatibility or

remedy to many of these perceived evils and shortcomings inherent in a fault-based divorce regime. Many courts and commentators therefore bid their not-so-fond farewells to fault-based factors in American divorce law.[5]

Yet this no-fault divorce revolution over the past thirty years has developed some very serious shortcomings of its own. In addition to a soaring divorce rate in the 1970s when no-fault divorce was first introduced in most states, a disturbing number of courts have failed to provide adequate financial protection for many women and children post-divorce,[6] and many children have suffered long-lasting psychological, as well as economic damage, resulting from divorce.[7] Indeed, some commentators have now concluded that the no-fault divorce revolution in America "has failed."[8] Accordingly, a growing number of

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irreconcilable differences. *See generally* Linda Elrod & Robert Spector, *A Review of the Year in Family Law*, 33 FAM. L.Q. 865, 911 (2000).

5. *See, e.g.*, Norman B. Lichtenstein, *Marital Misconduct and the Allocation of Financial Resources on Divorce: A Farewell to Fault*, 54 UMKC L. REV. 1 (1985); Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1 (1987); Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773 (1996). HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES §13.1 (2d ed. 1988) ("Today the non-fault grounds of marriage breakdown, incompatibility and living separate and apart, have been enacted in almost all the states. It is thus fair to say that there is now wide agreement that fault no longer should be relevant in determining whether or not a marriage should be dissolved, even though the fault grounds continue to exist in some states."). However, as discussed below, a substantial number of jurisdictions *still* recognize fault factors in divorce and have retained or enacted fault-based divorce ground alternatives to no-fault divorce, as well enacting statutory fault factors in determining spousal support awards and the equitable distribution of marital property in divorce. Thus, Clark's statement that fault "no longer should be relevant" is largely incorrect in the majority of American states today.

6. *See, e.g.*, Lenore J. Weitzman & Ruth B. Dixon, *The Alimony Myth: Does No-Fault Divorce Make a Difference?* 14 FAM. L.Q. 141 (1980); LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985); James B. McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351, 405 (1987) ("An end to the systemized impoverishment of women and children by the [no-fault] divorce regime must be one of the foremost items on the nation's new agenda."). Although the accuracy of Weitzman's statistical studies has recently been questioned, other similar studies have corroborated this "feminization of poverty" resulting from divorce. According to 1996 data from the Social Science Research Council in New York, for example, a woman's standard of living declines 30 percent on average the first year after a divorce, while a man's rises by 10 percent. Elizabeth Gleick, *Hell Hath No Fury*, TIME, Oct. 7, 1996, at 84.

7. *See, e.g.*, JUDITH S. WALLERSTEIN ET AL., THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY (2000); JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE (1989) (both discussing the long-term negative effects of divorce on children); KAREN WINNER, DIVORCED FROM JUSTICE: THE ABUSE OF WOMEN AND CHILDREN BY DIVORCE LAWYERS AND JUDGES (1996); Robert F. Cochran, Jr. & Paul C. Vitz, *Child Protective Divorce Laws: A Response to the Effects of Parental Separation on Children*, 17 FAM. L.Q. 327 (1983) ("Recent studies in the field of psychology have shown that parental separation and divorce have substantial negative effects on children."); Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 29 (1990) ("There is substantial evidence that the process of going through their parents' divorce and the resulting changes in their lives are psychologically costly for most children.").

8. *See, e.g.*, COUNCIL ON FAMILIES IN AMERICA, MARRIAGE IN AMERICA: A REPORT TO THE NATION 1 (1995) ("The divorce revolution—the steady displacement of a marriage culture by a culture of divorce and unwed parenthood—has failed. It has created terrible hardships for children, incurred unsupportable social costs, and failed to deliver on its promise of greater adult happiness.

courts and commentators have been reassessing whether fault factors may still serve a legitimate purpose in no-fault divorce regimes.[9] Likewise, a growing number of state legislatures have been reassessing the role of fault in contemporary American divorce law, as well as arguing for a concurrent goal of protecting or "reinstitutionalizing" marriage.[10]

The time has come to shift the focus of national attention from divorce to marriage and to rebuild a family culture based on enduring marital relationships.").

9. *See, e.g.*, Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM. L.Q. 269 (1997); Adriaen M. Morse, Jr., *Fault: A Viable Means of Re-Injecting Responsibility in Marital Relations*, 30 U. RICH. L. REV. 605 (1996); Woodhouse, supra note 1, at 2525; J. Herbie DiFonzo, *No-Fault Marital Dissolution: The Bitter Triumph of Naked Divorce*, 31 SAN DIEGO L. REV. 519 (1994); R. Michael Redman, *Coming Down Hard on No-Fault*, 10 FAM. ADVOC. 6 (1987); Harvey L. Golden & J. Michael Taylor, *Fault Enforces Accountability*, 10 FAM. ADVOC. 11 (1987); *see also* Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 137 (1991):

> [T]he time has come to consider reforming the first generation of no-fault divorce laws. It would be unrealistic and irresponsible to ignore the fundamental fallacies and specific failures of the current generation of no-fault divorce laws. This does not mean we should "turn the clock back" and reenact 1950s—era divorce laws. But we should be unafraid to ask hard questions about the 1970s-era no-fault divorce laws we have inherited. It is time to adopt a new generation of divorce law reforms.

10. *See, e.g.*, Stanley & Markman, *Can Government Rescue Marriages?* 1-2 (The University of Denver Center for Marital and Family Studies (1997):

> There is a trend sweeping the country to make changes in legal codes to strengthen and stabilize marriages. There are two key thrusts emerging in state legislatures: the first involves changes in laws that would make it harder for couples to divorce; the second involves efforts to encourage or mandate couples to participate in premarital counseling. . . While strange bedfellows, there is a growing consensus among both liberal and conservative political and religious leaders that something must be done. . .

Examples of such state legislation include so-called "covenant marriage" statutes in Arizona and Louisiana where the parties consensually agree not to obtain a no-fault divorce, and only dissolve their marriage based upon traditional fault grounds or a separation for a number of years. The couple also agrees to obtain premarital counseling prior to marriage. *E.g.*, ARIZ. REV. STAT. § 25-901 (2000); LA. REV. CODE § 9-224 (2000). Legislators in at least twenty other states have introduced similar bills to modify no-fault divorce laws. *See* Mary Corey, *States Explore Making Breaking Up Hard to Do*, BALT. SUN, May 19, 1997, at A1.

The Florida legislature also has passed its sweeping bipartisan Marriage Preparation and Preservation Act, providing that: 1) all Florida high school students must take a required course in "marriage and relationship skills"; 2) engaged couples are encouraged (but not required) to take a "premarital preparation course" which may include instruction in conflict resolution, communication skills, financial responsibilities, and children and parenting; 3) each couple applying for a marriage license will also be given a handbook prepared by the Florida Bar Association informing couples of "the rights and responsibilities under Florida law of marital partners to each other and to their children, both during marriage and upon dissolution"; and (4) couples with children who file for divorce must take a "Parent Education and Family Stabilization Course" that covers the legal and emotional impact of divorce on adults and children , financial responsibility, laws regarding child abuse and neglect, and conflict resolution skills. *See* Mike McManus, *Florida Passes Nation's Most Sweeping Reform of Marriage Laws*, ETHICS & RELIGION, May 16, 1998 (predicting that this law will inspire many other states to pass similar laws); *see also* LINDA WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, & BETTER OFF FINANCIALLY (2000) (analyzing data from the National Survey of Families and Households, sociologist Linda Waite found that 86 percent of people who said they were in bad marriages, but who decided to stay married, said five years later that their marriages had turned around and they were happier, or very happy. Waite concludes that, "A[b]ad marriage is nowhere near as permanent a condition as we sometimes assume.").

As a result,fault factors in divorce are far from a "dead issue" in contemporary American law and society, and a substantial number of states continue to include and utilize various fault-based statutory factors in determining spousal support and equitable distribution of marital property upon divorce.[11] Nevertheless, the American Law Institute's *Principles of the Law of Family Dissolution*[12] argue for the total abolition of all fault-based factors in marital dissolution or divorce, and flatly exclude any consideration of nonfinancial marital misconduct either in the allocation of marital property,[13] or in the determination of compensatory spousal support payments.[14]

The fundamental premise of this commentary is that the ALI has erred in *not* including appropriate nonfinancial fault-based factors in the *Principles* for three major reasons: 1) other no-fault laws, including no-fault automobile insurance law, no-fault workers compensation law, and strict liability in tort law, have all incorporated a number of fault-based exceptions to their general no-fault framework for serious or egregious conduct, and American divorce law should likewise have a similar fault-based exception for serious or egregious marital misconduct; 2) a substantial number of states continue to recognize and utilize a number of fault-based statutory factors in divorce for serious and egregious marital misconduct, and these state courts generally have applied such fault-based remedies in a realistic and responsible manner; and 3) alternative tort or criminal law remedies for serious and egregious marital misconduct have proven to be inadequate legal remedies in theory and practice. Accordingly, this commentary will conclude that fault-based factors for egregious marital misconduct should be retained, or should be seriously reconsidered, by any state legislature that is considering legislative adoption of the ALI *Principles.*

II. THE PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: A FAREWELL TO FAULT

The *Principles* forcefully argue for the establishment of "consistent and predictable" principles of family law relating to compensatory spousal support payments and the division of marital property in divorce. These principles are to be solely based upon no-fault financial principles and objectives, to the exclusion of any nonfinancial fault-based factors such as marital misconduct. Although this appears to constitute an impressive and comprehensive approach toward achieving an equitable sharing of loss from divorce or dissolution of marriage, and although this author supports many of these proposals and objectives relating to financial loss, the *Principles* make some questionable assumptions and some largely unsupported assertions regarding the role of marital fault in determining spousal support and the division of marital property in divorce.

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11. *See, e.g.*, Linda Elrod & Robert Spector, *supra* note 4, at 908.

12. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (Proposed Final Draft, 2000) [hereinafter ALI PRINCIPLES 2000].

13. *Id.* § 4.15 cmt. e.

14. *Id.* § 5.02(2) cmt. e.

Part I of the *Principles*[15] is a comprehensive discussion of recommended family law principles covering the subjects property division upon dissolution of marriage and compensatory spousal support payments. While a comprehensive analysis of these principles is beyond the scope of this present commentary, it will respond to a number of troubling assumptions and largely unsupported assertions made in Topic Two of the *Principles*, entitled "The Relevance of Marital Misconduct in Property Allocations and Awards of Compensatory Payments,"[16] and argue for the inclusion of noneconomic fault-based factors for serious and egregious martial misconduct.

First, it is important to note that this particular ALI project is *not* a Restatement of the Law, but instead proposes various "principles" of family law which "give greater weight to emerging legal concepts than does a Restatement."[17] It also parenthetically recognizes that a substantial number of American states to date have *not* adopted a "true" no-fault divorce regime in accordance with the *Principles*.[18]

In an earlier seminal article, *The Theory of Alimony*,[19] Chief Reporter Ira Mark Ellman argued for a purely financial and compensatory no-fault approach to spousal support or alimony. Basically, Ellman's theory of alimony conceptualized spousal support as compensation earned by the economically-disadvantaged spouse (normally the wife) through marital investments and as a means to eliminate distorting financial incentives in marriage—rather than as a way of relieving need, as current alimony law generally prescribes.[20] However, Ellman's theory has been criticized by other commentators for not recognizing important nonfinancial losses in divorce. June Carbone, for example, faults Ellman for ignoring larger noneconomic interests of society including child rearing, married women's participation in the work force, a return of appropriate benefits that the other spouse retains in divorce, and sexual equality issues.[21] Carl Schneider, while praising Ellman for attempting to provide a coherent rationale for alimony, criticizes him for his refusal to acknowledge any moral discourse on the subject of awarding alimony.[22] Schneider disagrees with Ellman's reasoning that the modern divorce reform movement in America has "rejected" all fault standards by noting that fault is still taken into account in many jurisdictions in awarding alimony[23] and that a broader view of alimony should still require a great deal of traditional discretion by the court.[24] Finally, Adriaen Morse,

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15. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (Proposed Final Draft Part I, 1997) [hereinafter ALI PRINCIPLES 1997].

16. *Id.* Introduction at 14-74.

17. *Id.* Foreword at xiii.

18. *See infra* notes 28-29 and accompanying text.

19. Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1 (1989).

20. *Id.* at 50-52.

21. June Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1463 (1990).

22. Carl E. Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 BYU L. REV. 197.

23. *Id.* at 249-50.

24. *Id.* at 252-53.

Jr., also faults Ellman for ignoring nonfinancial moral issues in divorce.[25] Morse notes in his reply to Carbone and Schneider[26] that Ellman once again dismisses marital fault considerations that are allowed in only a "small minority" of states[27] even though a *majority* of states—approximately thirty jurisdictions—still consider marital fault in determining alimony[28] and a *majority* of states—approximately thirty-two jurisdictions—currently retain alternative fault grounds for dissolving the marital relationship.[29] Thus, as Morse aptly observes:

> Dismissing fault from consideration because it is a factor in only a "small minority" of states seems almost ludicrous in view of the facts [since] many legislatures have not been so overcome by the charms of no-fault [divorce] as to wish to repeal the fault remedies entirely. Thus, in this area, Professor Ellman has failed to honestly consider whether moral relations should be factored into alimony. A shrug is not an argument.[30]

This same criticism also can be leveled at the *Principles'* rather curt and unpersuasive dismissal of the role of marital fault in the dissolution of marriage.[31] The *Principles* reject the application of any fault-based nonfinancial factors in determining the allocation of marital property rights and compensatory spousal support awards in divorce based upon three rather questionable premises: 1) utilizing fault factors "as an agent of morality" in effect "reward[s] virtue and punish[es] sin;"[32] 2) judicial discretion would be "inherently limitless if no find-

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25. *See generally* Morse, *supra* note 9.

26. *See* Ira Mark Ellman, *Should The Theory of Alimony Include Nonfinancial Losses and Motivations?*, 1991 BYU L. REV. 259.

27. *Id.* at 262.

28. *See* Linda Elrod & Robert Spector, *supra* note 4, at 908.

29. *Id.* at 911. Ellman argues in the *Principles* that the two categories of existing divorce law—characterized as either fault or no-fault—"are inadequate to describe the major variations in state policy" regarding this subject. ALI PRINCIPLES 1997, *supra* note 15, Introduction at 15. Instead, he groups the states into five major categories: 1) "pure no-fault" property and alimony states [The *Principles* list twenty states in this category, although Elrod & Spector identify only seventeen "true" no-fault states]; 2) "pure no-fault property, almost pure no-fault alimony" [five states]; 3) "almost pure no-fault" and alimony states [three states]; 4) "no-fault property, fault-in-alimony" states [seven states]; 5) and "full-fault" alimony and property states [fifteen states]. *Id.* at 15-22. Some commentators have questioned the accuracy of these five major groups. *See, e.g.*, Swisher, *supra* note 9, at 301-02 n.113. Whatever categorization one utilizes, however, it is clear that a majority of American states still recognize and utilize various noneconomic fault factors in determining spousal support, the equitable distribution of marital property, or both.

30. Morse, *supra* note 9, at 638.

31. For example, Comment e to Section 5.02 of the *Principles* dealing with spousal support payments in divorce states that "Paragraph (2) [of Section 5.02] excludes consideration of marital misconduct in the equitable allocation of the financial losses arising at dissolution. This is consistent with the position of the Uniform Marriage and Divorce Act and of approximately half of the states. . ." ALI PRINCIPLES 1997, *supra* note 15, § 5.02 cmt. e. Likewise, Comment e to Section 4.15 of the *Principles* excludes marital misconduct factors in the distribution of marital property which is "consistent with the prevailing trend in the law since the 1970 approval of the Uniform Marriage and Divorce Act." *Id.* § 4.15 cmt. e. In fact, only a *minority* of states have adopted the Uniform Marriage and Divorce Act to date, and only a *minority* of states are "true" no-fault jurisdictions. So, if there is any current majority "trend" in American family law today, it is to *retain* fault factors in divorce as one of many statutory factors that a majority of state courts still consider in determining spousal support and marital property rights. *See supra* notes 28-29 and accompanying text.

32. ALI PRINCIPLES 1997, *supra* note 15, Introduction at 23.

ing of economic harm to the claimant is required to justify [such an] award or its amount;"[33] and 3) compensation for serious harm caused by the wrongful conduct of a spouse is "better left" to a separate criminal law or tort law remedy rather than a concomitant fault-based divorce remedy.[34] The remainder of this commentary will analyze, criticize, and challenge these assumptions.

III. LIKE OTHER NO-FAULT LAWS, AMERICAN NO-FAULT DIVORCE LAW SHOULD INCORPORATE FAULT-BASED EXCEPTIONS FOR SERIOUS OR EGREGIOUS CONDUCT

The *Principles* first argue that utilizing noneconomic fault factors "as an agent of morality" in effect "reward[s] virtue and punish[es] sin".[35] This characterization is appropriate where it applies to compensation for serious or egregious marital misconduct. The moral ramifications of marital fault *should* continue to play a legitimate contemporary role as one of many statutory factors in determining spousal support obligations and the division of marital property if a spouse is guilty of serious or egregious marital misconduct. This is true in a majority of American jurisdictions,[36] and it is consistent with other no-fault laws in the vast majority of American states today.

Remedial no-fault legislation, whether applied to no-fault automobile insurance law, no-fault workers compensation law, no-fault strict products liability law, or no-fault divorce law, is seldom truly no-fault in practice. Although these remedial laws attempt to provide certain economic benefits to an injured or wronged party by partially alleviating the traditional burden of proof to demonstrate the other party's fault or unreasonable conduct, none of these remedial no-fault laws totally abolishes or abrogates a defendant's responsibility or accountability for his or her actions involving serious or egregious conduct.

For example, although a majority of states have now adopted some form of no-fault automobile insurance legislation, these statutes are not completely no-fault in nature. It is true that up to a statutory threshold, which is often quite low, an insured automobile driver or passenger cannot sue another driver for personal injury resulting from a motor vehicle accident, and an injured party must look to his or her own insurance company for compensation. However, certain statutorily-prescribed injuries are normally exempt from this no-fault cap including: death, dismemberment, disfigurement, permanent loss of a bodily function, and property damage.[37] Indeed, some commentators now refer to these no-fault automobile insurance statutes as "partial tort exemption statutes."[38]

Likewise, under no-fault workers' compensation statutes, intentional self-injuries would bar a worker's claim, while egregious employer conduct would

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33. *Id.* at 24.

34. *Id.* at 28.

35. *Id.* at 23.

36. *See supra* notes 28-29 and accompanying text.

37. *See, e.g.*, EMERIC FISCHER & PETER SWISHER, PRINCIPLES OF INSURANCE LAW 511-516 (2d ed. 1994); ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW § 4.10 (1988). *See generally* ROGER S. CLARK ET AL., NO-FAULT AND UNINSURED MOTORIST AUTOMOBILE INSURANCE (Barry Denkensohn et al. eds., 3rd ed. 1986).

38. *See, e.g.*, KEETON & WIDISS, *supra* note 37, at 421-25.

lead either to an enhanced compensation award or the right to sue in tort in addition to the workers' compensation award.[39] Moreover, in products liability litigation, the strict liability in tort actions that has been embraced by most American jurisdictions now approximates a negligence foreseeability standard with regard to defective design and defective warning cases, and the conduct of the consumer is always relevant.[40]

Finally, the no-fault divorce laws in a substantial number of American states are not truly no-fault in nature, because approximately thirty-two states currently retain various fault-based grounds for divorce, although affording no-fault alternatives.[41] Fault is still a relevant factor in at least thirty states for determining alimony or spousal support.[42] Indeed, the number of states that have adopted fault-based statutory factors for divorce, has *increased* rather than decreased over the past five years.[43]

Why this strong—and continuing—legislative recognition of fault-based divorce factors, despite the general abandonment, apparent disregard, and premature dismissal of nonfinancial fault factors by many academicians and the *Principles*? Perhaps this can be explained by the strong public policy rationale underlying divorce law in a majority of states today. The rationale is that moral issues still *do* matter in a family law context,[44] and that state legislatures and courts still *do* take into account the responsibility and accountability[45] of the respective spouses, especially when one spouse is guilty of serious or egregious marital misconduct.[46] Again, as Adriaen Morse Jr. observes:

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39. *See, e.g.*, Jean C. Love, *Punishment and Deterence: A Comparative Study of Tort Liability for Punitive Damages Under No-Fault Compensation Legislation*, 16 U.C. DAVIS L. REV. 231 (1983).

40. *See, e.g.*, Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593 (1980); James A. Henderson & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265 (1990); Peter Nash Swisher, *Products Liability Tort Reform: Why Virginia Should Adopt the Henderson-Twerski Proposed Revision of Section 402A, Restatement (Second) of Torts*, 27 U. RICH. L. REV. 857 (1993). *See also* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 (1998); HENRY WOODS, COMPARATIVE FAULT § 1:11 (2d ed. 1987).

41. *See* Elrod & Spector, *supra* note 4, at 911.

42. *Id.* at 908.

43. For example, Elrod and Walker reported that in 1994, twenty-four jurisdictions still considered marital fault in awarding alimony, and thirty states retained alternative fault grounds for dissolving a marriage. *See* Linda D. Elrod & Timothy B. Walker, *Family Law in the Fifty States*, 27 FAM. L.Q. 515, 534, 661 (1994). Currently, those figures are thirty states and thirty-two states respectively. Elrod and Spector, *supra* note 4, at 908, 911.

44. *See generally* Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985); Schneider, *supra* note 22. *See also infra* notes 48-49.

45. The underlying concept of fault goes beyond moral "blame" and generally encompasses a much greater sense of spousal responsibility and accountability. *See, e.g.*, Golden & Taylor, *supra* note 9, at 12 ("Very few states totally ignore fault [in divorce proceedings]. This is because we are brought up to believe that people should be held accountable for their actions, and that courts should establish such accountability and consider it."). Moreover, marriage, "as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution," has always been subject to the control of the state legislatures and courts. *See* Maynard v. Hill, 125 U.S. 190, 205 (1888).

46. As will be explained more fully below, the courts generally take into account serious and egregious marital misconduct in making an unequal division of marital property or an enhanced

> The whole notion of fault proves to be a stumbling block for many scholars writing about the current pursuit of equitable ways of dealing with alimony [and the division of marital property in divorce]. However, as noted earlier, fault provides an excellent tool to encourage the type of behavior society believes to be appropriate in marriage, and to discourage that behavior which society deems to be inappropriate. It seems that most people would at least agree that engaging in adultery, cruelty, or desertion is not the sort of sharing behavior which marriage should have to endure. In order to provide a disincentive for such behavior, there should be concomitant post-divorce financial consequences for engaging in inappropriate behavior.[47]

Indeed, if contemporary marriage is viewed today as a shared partnership with important economic *and* noneconomic expectations,[48] then a "true" no-fault divorce regime, as proposed in the *Principles*, reduces marriage on dissolution only to impersonal and unrealistic economic calculations, and refuses to consider many important nonmonetary marital contributions to the well-being of the family.[49]

Finally, the absence of any fault-based statutory factors for egregious marital misconduct may place an almost insurmountable burden on an abused spouse—normally, but not always, the wife—to obtain compensatory relief from an abusive spouse—normally, but not always, the husband. This very serious problem is illustrated in a number of troublesome cases in a minority of states that have adopted a "pure" or "complete" no-fault divorce regime[50] where nonfinancial fault no longer plays any significant role in determining divorce grounds and defenses, spousal support awards, or the equitable distribution of

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alimony award in divorce, but many generally ignore "ordinary" marital misconduct in making a financial award. *See generally infra* notes 69-83.

47. *See* Morse, *supra* note 9, at 640-41. Some commentators, however, have argued that with fault-based divorce factors, bad feelings and malevolence of the parties are enhanced and the parties are less inclined to reconcile. *See, e.g.*, Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719 (1997). Yet there is evidence to support the notion of continued hostility between the parties in no-fault divorces as well. *See* James Herbie DiFonzo, *Customized Marriage*, 75 IND. L.J. 875, 880 (2000) ("[T]here are. . . some indications that no-fault divorce litigation is becoming more acrimonious, with the litigative fire transferred from conflicts over divorce grounds to those over children and property issues.").

48. *See, e.g.*, Joan Krauskopf & Rhonda Thomas, *Partnership Marriage*: *The Solution to an Ineffective and Inequitable Law of Support*, 35 OHIO ST. L.J. 558 (1974); Marcia O'Kelly, *Entitlements to Spousal Support After Divorce*, 61 N.D. L. REV. 225 (1985). Other commentators, however, have questioned an "economic partnership" theory of marriage. They argue that equating the family relationship to a business could stimulate marital competition rather than marital sharing, encouraging people to view marriage *only* in economic terms, and thereby placing insufficient value on important *nonmonetary* contributions to the marriage. *See, e.g.*, Jane Rutherford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539 (1990); Martha Fineman, *Implementing Equality: Ideology, Contradiction, and Social Change, A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789; Carbone, *supra* note 21.

49. *See* Carbone, *supra* note 21; *see also* WINNER, *supra* note 7, at 31; Woodhouse, *supra* note 1, at 2567.

50. Approximately seventeen states have taken this approach. Significantly, however, thirty years after the so-called "no-fault divorce revolution," this is *not* a significant majority of American jurisdictions, in spite of claims by Ellman to the contrary. *See supra* notes 27-30.

marital property.[51] For example, in the case of *In re Koch*,[52] the Oregon Court of Appeals rejected a wife's claim for spousal support based upon injuries sustained by her in a severe physical confrontation with her husband. The court stated that under Oregon law fault could not be considered as a factor in dividing the parties' marital property or in awarding spousal support, so the wife's injuries resulting from her husband's physical violence against her were relevant only insofar as they affected her employability or her need for support.[53] Two other "true" or "complete" no-fault states have also held that the murder or attempted murder of one spouse by the other spouse would have no effect whatsoever on the division of the parties' marital property or any spousal support award, because such awards under "true" no-fault divorce law can only be based upon the financial needs of the parties, regardless of fault.[54]

The better reasoned and more persuasive approach is to recognize fault-based exceptions in both "true" and "modified" no-fault divorce regimes for serious and egregious marital misconduct, in order to protect and compensate an abused spouse for the acts of an abusive spouse. For example, in *Stover v. Stover*,[55] the Arkansas Supreme Court allowed an unequal division of marital property where the wife was found guilty of conspiring to kill her husband. In *Brabec v. Brabec*,[56] the Wisconsin Supreme Court held that marital fault might still be considered as a factor in a murder-for-hire scheme during the pendency of a divorce. Of course, fault-based factors are not limited only to murder-for-hire schemes, and should apply to any serious and egregious marital misconduct.[57] Thus, in cases of flagrant adultery or cruelty, the wife may still receive a greater share of the marital property, and egregious marital fault may also give a less empowered wife more leverage in negotiating a more equitable settlement and additional means of adequately providing for herself and her children.[58]

A purely financially-based "true" no-fault divorce regime, as proposed in the *Principles*, has not lived up to its initial hopes and expectations in adequately providing for women and children in divorce.[59] It is also becoming increasingly clear that "a fault-blind approach to divorce—like a fault-blind approach to domestic violence—hurts women by suppressing more authentic narratives of their lives. . . Instead of ignoring marital misconduct, we [should]

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51. *See, e.g.*, Boseman v. Boseman, 107 Cal. Rptr. 232 (Cal. Ct. App. 1973); Erlandson v. Erlandson, 318 N.W.2d 36 (Minn. 1982); In re Marriage of Tjaden, 199 N.W.2d 475 (Iowa 1972). These courts are able to take into account "economic fault," such as dissipation, concealment, or destruction of marital assets. *See, e.g.*, Ivancovich v. Ivancovich, 540 P.2d 718 (Ariz. Ct. App. 1975).

52. 648 P.2d 406 (Or. Ct. App. 1982).

53. *Id.* at 408.

54. *See, e.g.*, Mosbarger v. Mosbarger, 547 So. 2d 188 (Fla. Dist. Ct. App. 1989); *In re* Marriage of Cihak, 416 N.E.2d 701 (Ill. App. Ct. 1981); DeCastro v. DeCastro, 334 So. 2d 834 (Fla. Dist. Ct. App. 1976); *see also* Woodhouse, *supra* note 1.

55. 696 S.W.2d 750 (Ark. 1986).

56. 510 N.W.2d 762 (Wis. Ct. App. 1993).

57. *See, e.g.*, O'Brien v. O'Brien, 498 N.Y.S.2d 743 (N.Y. 1985) (marital fault is excluded from consideration in equitable distribution awards except in egregious cases); *In re* Marriage of Sommers, 792 P.2d 1005 (Kan. 1990).

58. *See* WEITZMAN, *supra* note 6, at 14; WINNER, *supra* note 7, at 31-33.

59. *See supra* notes 6-10.

consider reshaping the discourse of fault in marriage so that it provides [more] affirmative protections for women."[60]

IV. A SUBSTANTIAL NUMBER OF STATES CONTINUE TO RECOGNIZE AND UTILIZE A NUMBER OF FAULT-BASED STATUTORY FACTORS FOR SERIOUS AND EGREGIOUS MARITAL MISCONDUCT, AND STATE COURT JUDGES GENERALLY HAVE APPLIED THESE FAULT-BASED REMEDIES IN A REALISTIC AND RESPONSIBLE MANNER

The *Principles* criticize the application of fault-based factors in divorce on the grounds that the imposition of such behavioral standards "must rely upon trial judge discretion" and "the moral standards by which blameworthy conduct will be identified and punished will vary from judge to judge, as each judge necessarily relies on his or her own vision of appropriate behavior in intimate relationships." Therefore, such judicial discretion "seems inherently limitless if no finding of economic harm to the claimant is required to justify the award or its amount."[61] This analysis can be questioned on three major grounds. First, family court judges, from their equity heritage as triers of both fact and law, have always possessed broad judicial discretion in adjudicating family law disputes. Second, such judicial discretion is *not* "inherently limitless" because it is constrained by various enumerated statutory factors as well as by appellate review. Finally, the current trend in many state courts today is to ignore or severely limit the effect of any fault-based factors, except in serious or egregious circumstances.

Family court judges, from their equity heritage as triers of both fact and law possess broad judicial discretion in adjudicating many family law disputes,[62] as the *Principles* readily concede.[63] For the *Principles* to characterize this judicial discretion as "inherently limitless" is an unfair and a largely unwarranted characterization when applied to the vast majority of family law disputes. Judicial discretion involving spousal support and the division of marital property in divorce is not as "limitless" as the *Principles* suggest, because judicial discretion in divorce matters currently is constrained and limited by the reasonable bounda-

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60. Woodhouse, *supra* note 1, at 2529-30.

61. ALI PRINCIPLES 1997, *supra* note 15, Introduction at 24, 69-70 ("The traditional marital fault rule requires extraordinary reliance on trial court discretion. Neither the standard of misconduct, nor its dollar consequences, are much bounded by any rule. While in principle the trial court's decision can be reviewed for "abuse of discretion," reversals are rare. . . The traditional fault rule is thus inconsistent with a major theme of the *Principles,* an effort to improve the consistency and predictability of trial court decisions.").

62. *See, e.g.*, CLARK, *supra* note 5, at 644-45 ("It is axiomatic that the trial courts have wide discretion in determining the propriety and the amount of alimony. . . As a result claims of alimony are won or lost in the trial courts, which have a corresponding heavy responsibility to deal fairly with the spouses in such cases."). This judicial discretion also applies to the classification, valuation, and distribution of marital property in divorce. *Id.* at 589-94, and to child custody determination. *Id.* at 796-97. Indeed, parental conduct and fitness are always relevant factors in any child custody dispute. *Id.* at 797-806.

63. *See, e.g.*, ALI PRINCIPLES 1997, *supra* note 15, Introduction at 6 ("It is . . . not surprising that research studies find that trial court decisions on alimony vary widely, even within the same jurisdiction. Some decisional variation would be expected in even a perfect system, because trial courts must have discretion in these matters to deal appropriately with factual variations that no statute can comprehensively anticipate. . . .").

ries of a number of state statutory factors which affect spousal support awards and the division of marital property in most states.[64] Moreover, what is significant in the recognition of various fault-based statutory factors is the fact that many of these factors are *recent* statutory reforms and amendments to earlier no-fault divorce legislation.[65] In addition, a trial judge's discretion in awarding spousal support and dividing marital property is likewise constrained and limited by appellate review for any erroneous application of law by the trial court judge,[66] or any abuse of judicial discretion.[67] Judicial discretion is further tempered and constrained by the vast majority of extremely capable family court judges who often serve long and distinguished judicial careers on the bench, and who possess the breadth, expertise, and day-to-day experience in reaching just and equitable results in a multitude of family law disputes.[68]

The strongest argument against the *Principles*' concern regarding "inherently limitless" judicial discretion, however, is the fact that most fault-sensitive jurisdictions now recognize marital fault as only *one* of *many* statutory factors that must be taken into consideration by the trial court judge in determining appropriate spousal support and marital property division.[69] Therefore, the current judicial trend in many states is that most judges tend to ignore or severely

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64. *See generally* Elrod & Spector, *supra* note 4, at 908, 912 (reporting that forty states presently have explicit statutory factors in order to determine spousal support in divorce, and thirty-six states presently have enumerated statutory factors to determine the equitable distribution of marital or community property in divorce).

65. *See, e.g.*, Barbara Bennett Woodhouse, *Toward a Revitalization of Family Law*, 69 TEX. L. REV. 245, 278-79 (1990).

66. *See, e.g.*, Benner v. Benner, 377 A.2d 582 (Md. 1977); Sparks v. Sparks, 485 N.W.2d 893 (Mich. 1992); Smoot v. Smoot, 357 S.E.2d 728 (Va. 1987).

67. *See, e.g.*, Clark v. Clark, 696 P.2d 1386 (Kan. 1985); Blank v. Blank, 389 S.E.2d 723 (Va. Ct. App. 1990); Paul v. Paul, 616 P.2d 707 (Wyo. 1980).

68. *See, e.g.*, Woodhouse, *supra* note 1, at 2560.

> I agree with the ALI's description of the complexities and challenges of the judging process, but not with the faint-hearted conclusion that judges are incapable of trying cases that depend on assessing the reasonableness of conduct in a given context or on calculating intangibles. We have learned to calculate "goodwill" in a business enterprise, to place a dollar value on an accident victim's pain, to judge corporate directors' fidelity in complex takeover negotiations, and to calibrate punitive damages to deter misconduct in many spheres. There is no reason why courts cannot undertake similar inquiries in the area of marital fault.

69. *See, e.g.*, Sparks v. Sparks, 485 N.W.2d 893 (Mich. 1992) (holding that marital misconduct is only *one* of *many* statutory factors in establishing the division of marital property in divorce, and therefore it should not be dispositive. The trial court judge must consider *all* the statutory factors, and since in this case disproportionate weight was given to the wife's fault, the trial court decision regarding division of the marital property was reversed and remanded on appeal). *Accord* Perlberger v. Perlberger, 626 A.2d 1186 (Pa. Super. Ct. 1993) (holding that a trial court may consider marital misconduct with respect to spousal support only in the context of *all* the relevant statutory factors); Tarro v. Tarro, 485 A.2d 558 (R.I. 1984) (holding that the trial court judge must consider *all* the enumerated statutory factors when awarding spousal support and the distribution of marital property); Rexrode v. Rexrode, 339 S.E.2d 544 (Va. Ct. App. 1986) (holding that a court must properly consider *all* the statutory factors in making an equitable distribution award of marital property or the award will be invalidated).

limit the ultimate effect of fault-based statutory factors in divorce, except in serious or egregious circumstances.[70]

An illustration of this modern judicial trend involves a number of appellate court decisions in the state of Virginia, which continues to incorporate marital fault factors in its statutory framework for determining spousal support[71] and equitable distribution of marital property.[72] For example, in *Smoot v. Smoot*,[73] the wife was awarded a divorce based upon the husband's willful desertion. On appeal the wife argued that the trial court improperly ignored the husband's marital fault in making an equitable distribution award of the parties' marital property.

The Virginia Supreme Court upheld the trial court award, holding that although the wife was granted a fault-based divorce, the evidence showed that the husband's desertion was only the "last unhappy event" in a marital relationship long since dissolved in fact," and therefore the husband's marital fault was *not* a dispositive factor in awarding spousal support or the equitable division of marital property, in light of other factors. Thus, the Virginia Supreme Court held that a spouse's marital fault would *not* be a relevant factor in awarding spousal support or the equitable distribution of marital property in divorce when it was not the substantial cause of the marital breakdown.[74] A number of other Virginia appellate court decisions have also supported this line of reasoning.[75]

In the case of *Aster v. Gross*,[76] the Virginia Court of Appeals was faced with multiple acts of adultery by the husband that were a cause of the marital break-

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70. *See, e.g.*, Anderson v. Anderson, 230 S.E.2d 272 (Ga. 1976); Platt v. Platt, 728 S.W.2d 542 (Ky. Ct. App. 1987); Thames v. Thames, 477 N.W.2d 496 (Mich. Ct. App. 1991); Perlberger v. Perlberger, 626 A.2d 1184 (Pa. Super. Ct. 1993); Tarro v. Tarro, 485 A.2d 558 (R.I. 1984); Williams v. Williams, 415 S.E.2d 252 (Va. Ct. App. 1992); Paul v. Paul, 616 P.2d 707 (Wyo. 1980).

71. As one of the many factors in determining spousal support in divorce in Virginia, the statute allows the court to consider the circumstances and factors that contributed to the dissolution of the marriage, including adultery, cruelty, or desertion. VA. CODE ANN. § 20-107.3 (MICHIE 2000). Failure by the trial court to consider *all* the statutory factors of Section 20-107.1 will constitute reversible error. *See, e.g.*, Woolley v. Woolley, 349 S.E.2d 422 (Va. Ct. App. 1986).

72. In determining the equitable distribution of marital property in divorce in Virginia, the statute allows the court to take into account any fault-based factors that contributed to the dissolution of the marriage including adultery, conviction of a felony, cruelty, or desertion. VA. CODE ANN. § 20-107.3. A court must consider *all* statutory factors in making an equitable distribution award in divorce. *See, e.g.*, Rexrode v. Rexrode, 339 S.E.2d 544, 550 (Va. Ct. App. 1986).

73. 357 S.E.2d 728, 732 (Va. 1987).

74. *Id.*

75. *See, e.g.*, Williams v. Williams, 415 S.E.2d 252 (Va. Ct. App. 1992) (holding that a divorce decree ordering a husband to pay spousal support to his wife was proper even though the husband had sufficiently proved his wife's adultery, since the court could award spousal support according to the statutory factors of VA. CODE ANN. § 20-107.1 notwithstanding a finding of wife's adultery); and Barnes v. Barnes, 428 S.E.2d 294 (Va. Ct. App. 1993) (holding that the wife's post-separation adultery would not bar her from receiving spousal support since her adultery had little to do with the deterioration of the marriage, which had already been irretrievably lost due to the mutual acts of the parties).

76. 371 S.E.2d 833 (Va. Ct. App. 1988).

down.[77] Nevertheless, the trial court held, and the court of appeals affirmed, that such multiple acts of adultery did not have any adverse *economic* effect on the marriage, that the wife failed to allege that husband's conduct resulted in any adverse economic consequences, and that the dissolution of the marriage was based on the cumulative effect of many other factors.[78] The *Aster v. Gross* decision therefore stated that *economic fault*—generally defined as the dissipation or waste of marital assets—should be the primary "fault-based" determinative factor in awarding spousal support and the equitable division of marital property in this particular case.[79] This "economic fault" concept has been adopted by the *Principles*.[80]

However, noneconomic fault re-emerged in the subsequent case of *O'Loughlin v. O'Loughlin*.[81] In *O'Loughlin*, the Virginia Court of Appeals held that an unequal division of marital property favoring the wife was supported by the "negative nonmonetary contributions" to the marriage by the husband who had been involved in an egregious, long-term adulterous relationship during the marriage. The court focused on the direct impact that the husband's egregious marital misconduct had on the quality and quantity of the wife's nonmonetary contributions to the well-being of the family.[82] The court concluded that noneconomic fault was as relevant as economic fault when it involved serious and egregious marital misconduct that constituted *the* substantial cause of the marital breakdown.[83] The trial court judge in *O'Loughlin*, however, was *not* allowed

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77. *Id.* at 836 (where the husband conceded that he was substantially at fault for the breakdown of the marriage, having committed adultery with seven different persons throughout his twenty-year marriage).

78. *Id.*; *see also* Gamer v. Gamer, 429 S.E.2d 618 (Va. Ct. App. 1993) (similar holding).

79. *See* PETER N. SWISHER ET AL., VIRGINA FAMILY LAW: THEORY AND PRACTICE § 11-29, 494-95 (2d ed. 1997):

> It is suggested that a careful reading of *Aster v. Gross* does not remove the consideration of [noneconomic] fault from a court's decision making process. In fact, the Court of Appeals in *Aster* acknowledged that the trial court had properly considered fault and the circumstances that led to the dissolution of the marriage in making its monetary award. The focus of the court's limitations was on the cumulative effect of other acts of fault that had no more effect on the dissolution of the marriage than the original proven act of adultery. Thus, the court did not need to consider the specifics of every possible ground of divorce where such grounds or acts did not add to the economic consequences caused by the dissolution of the marriage.

80. *See generally* ALI PRINCIPLES 1997, *supra* note 15, § 4.16.

81. 458 S.E.2d 323 (Va. Ct. App. 1995).

82. *Id.* at 326. The O'Loughlin court concluded, "Just as marital fault could be shown to have an economic impact on a marriage, i.e., waste or dissipation of assets, it can also be shown to have detracted from the marital partnership in other ways. Thus, in this case, the trial court found. . . that [husband's] long-term infidelity and abusive behavior over the course of the marriage actually had a negative impact on the marital partnership."

83. *See* SWISHER, ET AL., *supra* note 79, at 495.

> It is submitted that [the *O'Loughlin* holding] is not inconsistent with the *Aster* holding since it focused on the direct impact and effect the husband's [egregious marital misconduct] had on the nonmonetary factors that must be considered by the court, rather than the monetary impact restriction of the *Aster* holding. . . In summary, *O'Loughlin* appears to be to the nonmonetary factors of [VA. CODE ANN. § 20-107.3] what *Aster* was to the monetary and financial factors in both its holding and practical impact to the family law practitioner. *Id.*

to use any "inherently limitless" judicial discretion in applying these fault-based factors in an arbitrary or punitive manner.[84]

These cases illustrate the current judicial trend in many states today in which most judges tend to ignore or severely limit the ultimate effect of fault-based statutory divorce factors except in serious or egregious circumstances. Accordingly, state court judges generally apply these fault-based statutory remedies in a realistic and responsible manner, rather than through "inherently limitless" judicial discretion.

V. PROPOSED ALTERNATIVE TORT OR CRIMINAL LAW REMEDIES FOR SERIOUS AND EGREGIOUS MARITAL MISCONDUCT HAVE PROVEN TO BE INADEQUATE LEGAL REMEDIES IN THEORY AND IN PRACTICE

Finally, Professor Ellman in a companion law review article, argues that compensation for nonfinancial loss imposed by the other spouse's egregious marital misconduct is "better left" to a separate criminal law or tort remedy:

> [T]he potentially valid functions of a fault principle are better served by the tort and criminal law, and attempting to serve them through a [divorce based] fault rule risks serious distortions in the resolution of the [marital] dissolution action. . . . Compensation for the non-financial losses imposed by the other spouse's battery or emotional abuse, is better left to tort law. . . . Where valid compensation claims arise, whether for physical violence or emotional abuse, the tort law provides principles to measure and satisfy them, and to determine when they are too stale to entertain. . .[85]

Likewise, the *Principles* conclude:

> [A] fault rule would serve compensation functions [for pain and suffering arising from the other spouse's assault and battery or emotional distress] that may already be served by tort law. Such duplication is inadvisable. There is no reason to reinvent compensation principles under the rubric of fault adjudications, nor to incorporate tort principles into divorce adjudications. A jurisdiction that wants concurrent consideration of tort claims and dissolution [of marriage] remedies may permit their joinder. Whether it should do so requires consideration of procedural issues beyond the scope of the *Principles*.[86]

Professor Ellman and the *Principles* are correct in asserting that there is "no reason to reinvent compensation principles under the rubric of fault adjudica-

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84. O'Loughlin v. O'Loughlin, 458 S.E.2d at 336 (Va. Ct. App. 1995):

> In considering evidence of fault under any of the [statutory] factors of [Virginia] Code 20-107.3 [note 73 *supra*], we still adhere to our reasoning in *Aster*. Fault is not a "wild card" that may be employed to justify what otherwise would be an arbitrary or punitive award. When fault is relevant in arriving at an award, the trial judge is required to consider it objectively, and how, if at all, it quantitatively affected the marital estate or well being of the family.

85. Ellman, *supra* note 19, at 807-08. A criminal law remedy, such as a spousal rape statute or domestic violence statute, may punish the wrongdoer spouse under state criminal law sanctions, but a criminal law remedy does not necessarily compensate the injured spouse. *See, e.g.,* Commw. v. Chreten, 417 N.E.2d 1203 (Mass. 1981); State v. Smith 426 A.2d 38 (N.J. 1981); Weishaupt v. Commw., 315 S.E.2d 847 (Va. 1984).

86. ALI PRINCIPLES 1997, *supra* note 15, Introduction at 28-43 (discussing tort claims for assault and battery and the intentional infliction of emotional distress).

tions," but for an entirely different reason. Fault adjudication in divorce *already* exists in a majority of American jurisdictions today based upon strong underlying public policy reasons,[87] so fault adjudication in divorce, in a majority of states at least, need *not* be "reinvented."

However, the *Principles* incorrectly attempt to characterize nonfinancial fault-based compensatory remedies only in terms of assault and battery or tortious infliction of emotional distress. Serious and egregious marital misconduct may well include assault and battery and the infliction of emotional distress, as well as spousal abuse, domestic violence, and attempted murder.[88] But serious marital misconduct is not limited solely to physical or mental cruelty. Adultery that substantially contributes to the dissolution of a marriage also is recognized as a relevant fault-based factor in a substantial majority of jurisdictions.[89] Furthermore, as the *Principles* concede, emotional distress actions based upon the other spouse's adultery are generally *not* actionable as an independent tort action.[90] Moreover, a number of independent emotional distress tort cases brought by an aggrieved spouse have *not* been successful, for the alleged marital misconduct was not deemed "outrageous" enough to qualify as the intentional infliction of emotional distress.[91]

Consequently, as Professor Robert Spector observed in a recent law review article discussing marital torts:

> [A]lthough appellate opinions may suggest that there are a vast number of tort cases associated with divorce, in practice there are relatively few cases that are actually brought and even fewer where there has actually been a recovery. The reasons for this are not doctrinal but practical. Matrimonial lawyers overwhelmingly indicate that their clients are simply not interested in bringing marital tort cases. Malpractice concerns indicate that attorneys must advise their clients about the possibility of bringing a civil tort action. However, practically all clients show a distaste for the prolonging of the process that a civil case would entail. As a result, a large number of cases that otherwise might prove to be viable are simply not filed.
>
> Second, even when the [divorce] client is willing to bring a separate tort action there may not be a source of funds to pay the damages. Most homeowners insurance policies no longer cover intentional torts. Therefore only where the tort defendant has sufficient assets to satisfy the judgment is a case viable. . . .

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87. *See supra* notes 29-30 and accompanying text; s*ee also supra* notes 44-49 and accompanying text.

88. *See In re* Marriage of Sommers, 792 P.2d 1005, 1012 (Kan. 1990); Brancovenau v. Brancovenau, 535 N.Y.S.2d 86 (N.Y. App. Div. 1988); *In re* Marriage of Brabec, 510 N.W.2d 752 (Wis. Ct. App. 1993).

89. *See, e.g.*, GA. CODE ANN. § 19-6-1 (Lexis 1999); MASS. GEN. LAWS ANN. ch 208, §34 (1997); PA. CONS. STAT. ANN. § 3701(14) (2000). *See supra* notes 28-29, 69-83.

90. *See* ALI PRINCIPLES 1997, *supra* note 15, Introduction at 32 n.43, *citing* Strauss v. Cilek, 418 N.W.2d 378 (Iowa Ct. App. 1987); Ruprecht v. Ruprecht, 599 A.2d 604 (N.J. Super. Ct. Ch. Div. 1991); Poston v. Poston, 436 S.E.2d 854 (N.C. Ct. App. 1993); Alexander v. Inman, 825 S.W. 2d 102 (Tenn. Ct. App. 1991).

91. *See* ALI PRINCIPLES 1997, *supra* note 15, Introduction at 31-34. *See, e.g.*, Hetfeld v. Bostwick, 901 P.2d 986 (Or. Ct. App. 1995); Dye v. Gainey, 463 S.E.2d 97 (S.C. Ct. App. 1995).

> A final consideration that militates against a large number of [marital] tort claims is that the family law bar is rather inexperienced in the personal injury area. This inexperience is probably less of a factor than others since over the last couple of decades family law attorneys have learned many new subjects as diverse as pension law, professional good will, and child psychology. However, given the general approach of good family law attorneys toward settlement, it is unlikely that they would strongly counsel a client to bring a tort case against the client's own desires to see his or her case come to [a] rapid conclusion. . .[92]

So another major problem with the *Principles*' advocacy of an independent tort action for serious or egregious marital misconduct is that separate marital tort claims would foster a costly, onerous, unnecessary, and largely unsuccessful multiplicity of lawsuits—especially for injured spouses of modest means. Moreover, serious procedural questions of whether a tort claim should be joined in a divorce action, and under what applicable procedural guidelines, continue to trouble a number of courts and commentators. As Barbara Bennett Woodhouse observes:

> Tort claims for marital misconduct have several drawbacks. . . Because they are treated with suspicion as neither divorce claims nor classic forms of tort, tort remedies for spousal misconduct are often denied or restricted by courts, accustomed to no-fault ideology of marriage dissolution. They [also] raise tricky questions of *res judicata* and collateral estoppel, the right to a jury trial, overlapping recoveries, and limitations on damages. These issues. . . currently must be resolved by judges addressing individual cases in a piecemeal fashion and confined to the analytical structure of tort laws.[93]

Nevertheless, the *Principles* offer no persuasive answers to remedy these serious substantive and procedural issues involved in bringing a separate tort action for serious or egregious marital misconduct. Instead, the *Principles* conclude:

> Reliance on the tort system to provide a satisfactory result where one spouse's wrongful conduct has injured the other spouse requires attention to rules establishing the relationship between inter spousal tort claims and the financial remedies available in an action for marital dissolution. . . . [I]t may be that further attention to this matter is necessary. These questions, however, are largely procedural in nature, and are not within the scope of [the *Principles of the Law of Family Dissolution*].[94]

In effect then, the *Principles* advocate an independent tort action for serious or egregious marital misconduct that is both costly and duplicative, that is rarely utilized by the spouses in a successful manner, and that does not provide an adequate or realistic remedy for substantive claims of serious or egregious marital misconduct. It also raises a number of largely unresolved procedural issues as to exactly *how* such an independent tort action should be brought. If these serious substantive and procedural issues are not adequately addressed within the scope of the *Principles*, they arguably ought to be. The better-

92. Robert G. Spector, *Marital Torts: The Current Legal Landscape*, 33 FAM. L.Q. 745, 762-63 (1999).

93. Woodhouse, *supra* note 1, at 2566.

94. ALI PRINCIPLES 1997, *supra* note 15, Introduction at 50.

reasoned approach in a majority of states today, however, is to retain and utilize economic *and* noneconomic fault factors in determining fair and adequate spousal support awards and the equitable distribution of marital property when a spouse has been guilty of serious or egregious marital misconduct.

VI. CONCLUSION

The *Principles* reflect an underlying objective that financially-based legal principles should be "consistent and predictable" when applied to the division of marital property and compensatory spousal support awards in divorce.[95] Any proposal "to add a compensation-based fault rule to the *Principles*. . . could therefore be understood as revisiting the fundamental question of whether the law of marital dissolution should provide compensation for nonfinancial losses."[96] But legal consistency and predictability can be bought at too high a price,[97] if there is no fault-based exception to the general rule for the serious or egregious marital misconduct of a spouse.[98] Thus, any state that is seriously considering legislative adoption of the *Principles*—or any substantial part thereof—should retain, re-enact, or judicially recognize a fault-based remedy for the egregious marital misconduct of an abusive spouse.

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95. *Id.* §§ 4.02, 5.02.

96. *Id.* Introduction at 27.

97. *See, e.g.*, BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112-13 (Yale Univ. Press 1921):

> One of the most fundamental social interests is that law shall be uniform and impartial. . . But symmetrical development may be bought at too high a price. Uniformity ceases to be a good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare.

98. *See* Woodhouse, *supra* note 1, at 2561:

> Law should reflect and comment on the meaning of human experiences. A fault-blind scheme for balancing equities at divorce asserts that battering and bickering, desertion and disenchantment, repeated infidelity and disappointing marital sex, and the harms that flow from them, are qualitatively indistinguishable. In this telling, only financial relations are justiciable, and only money issues matter. Common sense as well as social science studies of the effects of divorce suggest that this story is neither useful as an ideal nor accurate as a reflection of people's experience.